SUPREME COURT OF NOVA SCOTIA
Citation: Bell v. Atlantic East Properties Ltd., 2010 NSSC 209

Date: 20100602
Docket: Hfx 313505
Registry: Halifax

Between:

Graeme John Bell

Plaintiff

v.

Atlantic East Properties Limited

Defendant

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	May 27, 2010 Halifax , Nova Scotia
Counsel:	Rebecca Hiltz LeBlanc, for the plaintiff James DePaolo, for the defendant

By the Court:

Introduction

[1] The plaintiff purchaser and defendant vendor entered into two agreements for the purchase and sale of undeveloped lots of land in Abbecombec Ocean Village, situated in Clam Bay, Halifax Regional Municipality, Nova Scotia. Neither transaction has closed in accordance with the terms of the agreements, although the plaintiff has made substantial contribution toward the purchase price for each. The defendant has accepted those monies, used them to its own purposes, but has been unable and/or unwilling to convey the subject properties.

[2] The defendant refuses to return the monies despite repeated demands by the plaintiff. As a result the plaintiff initiated an action to recover his money from the defendant. A defence was filed and now the plaintiff moves for summary judgment on evidence pursuant to **Civil Procedure Rule 13.04.**

Facts

[3] The evidence adduced in support of the motion consisted of affidavits of the plaintiff and his solicitor, each affidavit having various documents attached.

[4] The defendant was represented by James DePaolo, its President and part owner. With the consent of the plaintiff's counsel, Mr. DePaolo was permitted to give *vive voce* evidence at the hearing.

[5] The parties agree as to most of the material facts. At issue is the ultimate disposition of funds paid by the plaintiff to the defendant to purchase lots 245 and 247 in the Abbecombec development.

Lot 245

[6] On July 29, 2006, the parties executed an Agreement of Purchase and Sale, the essential terms of which called for the defendant to provide to the plaintiff a warranty deed to Lot 245 at closing on September 1, 2006. The purchase price was $36,000 plus HST of $5,400 for a total of $41,400. The defendant paid the $5,000 deposit as stipulated by the agreement. Although the property failed to close as scheduled, the plaintiff paid a further $33,000 to the defendant on October 31, 2006 for a total of $38,000.

[7] The lot was created on December 19, 2006. The property continues to be used by the defendant as its own. The defendant encumbered the lot with a mortgage in 2008, and a second mortgage in 2009. As at the date of hearing both are showing as unreleased.

Lot 247

[8] On December 7, 2006, the parties executed an Agreement of Purchase and Sale, the essential terms of which called for the defendant to provide to the plaintiff a warranty deed to Lot 247 at closing on March 30, 2007. The purchase price was $45,000 plus HST of $6,300 for a total of $51,300. On January 19, 2007, the defendant paid the $5,000 deposit as stipulated by the agreement. Although the property failed to close as scheduled, the plaintiff paid a further $15,000 to the defendant on June 6, 2007, and $12,000 on August 1, 2007, for a total of $32,000.

[9] The lot has never been created and so is not capable of being deeded to the plaintiff. The property, which includes the intended lot, continues to be used by the defendant as its own. The defendant encumbered the lot with a debenture in

2008, a mortgage in 2008, and a second mortgage in 2009. As at the date of hearing all are showing as unreleased.

Demands and Pleadings

[10] On October 14, 2008, the solicitor for the plaintiff wrote to the defendant's then solicitor demanding that the defendant provide a deed to Lot 245 or the return of the monies paid on account of that lot. The letter also demanded return of funds paid toward the purchase of Lot 247.

[11] On February 25, 2009 a further solicitor's letter was sent directly to Mr. DePaolo acknowledging that the "closing date was postponed multiple times" but stating that the plaintiff had satisfied his obligations and so demanded that the defendant immediately provide the deed to lot 245. The letter further demanded that the deed to lot 247 be provided by May 1, 2009.

[12] On July 2, 2009 the plaintiff filed a Notice of Action claiming that the defendant breached the contracts for purchase and sale of the two lots and seeking

general damages for breach of contract and unjust enrichment; special damages in the amount of $70,000; and interest on the purchase prices paid.

[13] A Notice of Defence was filed on July 31, 2009. It asserts a general denial of liability, and specifically claims that the parties entered into amended agreements for closing dates to accommodate engineering work needed on the properties, which resulted in delays agreed to by the plaintiff.

Position of the Plaintiff

[14] The plaintiff submits that the effect of sections 4 and 7 of the **Statute of Frauds** R.S. c.442, requires that to be enforceable at the instance of the defendant, any amendments to the agreements of purchase and sale must be in writing. As there are no such written amendments the strict terms of the existing agreements prevail. Since the defendant has breached the contracts, the plaintiff claims entitlement to return of the monies paid by him under those failed agreements.

Position of the Defendant

[15] Mr. DePaolo's evidence is that the plaintiff knew that in order to close the transactions it would be necessary to perform engineering work on the properties, and to obtain municipal approval of the subdivision, which approvals have eluded the defendant until recently. The defendant believes that it will soon be in a position to convey the properties to the plaintiff.

[16] He says that the plaintiff agreed to wait for the necessary work to be completed and knew that his purchase monies were being used by the defendant to fund work on the development. Mr. DePaolo asserts that the plaintiff never asked for a refund of his monies. He acknowledges that there are no written agreements entered into between the parties which would have the effect of amending the agreements in question.

Law

[17] This motion is brought pursuant to new **Civil Procedure Rule** 13.04 which reads:

> **13.04 (1)** A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
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> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[18] Bryson, J., writing recently in *AFG Glass Centre v. Roofing Connection* 2010 NSSC 108, set out a very helpful analysis of the application of this section in circumstances where, as here, it is the plaintiff who seeks summary judgement:

> [11] New **Civil Procedure Rule** 13.04(1) allows a judge to consider a motion for summary judgment when a claim or defence "fails to raise a genuine issue for trial." In this context, "issue" really means "genuine issue of material fact," (*United Gulf, supra; Gordon Capital, supra).* For a plaintiff to succeed on a

summary judgment application under the old Rule he had to "clearly" prove his claim and if the defendant were unable to set up a *bona fide* defence, or raise an arguable issue which should be tried, the plaintiff would be entitled to judgment. When trying to raise an arguable issue, it was not sufficient to simply assert one – the defendant had to disclose facts sufficient, if proved, to give rise to an arguable defence (*Montreal Trust Company of Canada v. Quad-Ram Development Group Ltd.* (1994), 136 N.S.R. (2d) 333, (C.A.).

[12] Ontario amended its Rules in 1985 to allow defendants to apply for summary judgment. A useful gloss on new Civil Procedure Rule 13.04(1) may be that supplied by the Ontario Court of Appeal in *Irving Ungerman Ltd. v. Galanis* [1991] O.J. No. 1478 (C.A.), at ¶ 16:

> Our rule does not contain, after "genuine issue", the additional words "as to any material fact". Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a "genuine issue for trial". (See Wright, Miller and Kane, *Federal Practice and Procedure*, 2nd ed. (1983), vol. 10A, pp. 93-95.) Similar reasoning applies to the absence from our rule of the words "and the moving party is entitled to a judgement as a matter of law". This is implicit.

[13] Keeping in mind that it is the plaintiff who is moving for summary judgment, and who must establish that there is no "genuine issue" for trial, I would characterize the test and applicable legal principles in this way;

> (1) The plaintiff must show that, on uncontroverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue;
>
> (2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;

> (3) The responding party must put "its best foot forward" or risk losing. This requires more than a simple assertion, but requires evidence, *United Gulf, supra*;
>
> (4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter, *Eikelenboom, supra*;

[14] To defeat a summary judgment application, a responding party cannot be coy about its true position. A vague assertion of factual disputes will not do. In *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, 2008 SCC 14, the Court said:

> [11] . . . Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried . . . The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts . . .
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> [19] . . . In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. ...

Analysis

[19] The first question to address is whether the plaintiff has shown that, on uncontroverted facts, he is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue.

[20] Mr. DePaolo admits that the monies claimed were paid by the plaintiff and received by the defendant, as part of the plaintiff's obligations under the agreements of purchase and sale. He agrees that the defendant has not returned the monies, and has not fulfilled its obligation under the agreements to provide deeds to the plaintiff for lots 245 and 247.

[21] The purchaser has paid the full price for the purchase of lot 245. He has also submitted a portion of the amount payable for the HST which has not yet become due, as the transaction has not closed. As a matter of law the defendant is in breach of contract and the plaintiff is entitled to succeed in his claim as it relates to lot 245.

[22] The purchaser paid $32,000 of a purchase price of $45,000 for lot 247. The balance would have been “payable on closing” pursuant to paragraph 2 of the agreement. The defendant could not comply with paragraph 7 of the Agreement requiring it to provide a “metes and bounds” within 7 days of the agreement being executed as there was and is no existing lot 247. The defendant did not and could not close the transaction or tender a deed to the plaintiff. Again, as a matter of law, the defendant is in breach of contract and the plaintiff is entitled to succeed in obtaining a refund of monies paid toward the purchase of lot 247.

[23] Is there evidence that satisfies me that the statement of defence raises a genuine issue for trial? To paraphrase Bryson J.: Has the defendant offered evidence that the defence has a real prospect of success, that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits?

[24] The defendant’s position rests on Mr. DePaolo’s evidence. At best, his testimony suggests a verbal agreement was achieved under which the plaintiff consented to the delays in closing. No part of these agreements was committed to

writing. Mr. DePaolo provides no detail as to when such agreements were reached, or what the details of them were.

[25] Mr. DePaolo is not a credible witness as to material pleadings in the company's defence. He swears that the plaintiff has not demanded the return of his money even in the face of uncontroverted evidence of a specific demand letter in October 2008, the filing of this action, and the filing of this motion, all of which consistently demand return of the money.

[26] He is either rationalizing or simply dishonest in saying that the plaintiff has been, and is supportive of the delay in order to allow the company to complete its tasks necessary to closing. It may be that for a period of time the plaintiff acquiesced in the delay or even agreed to some delay trusting that the transactions would close. However, his position, as evidenced by letters from his solicitor to the defendant starting in 2007, and which were entered into evidence, demonstrate conclusively that the plaintiff was actively seeking the prompt closing of these transactions. When that was unsuccessful he then began to demand a return of his money.

[27] Mr. DePaolo admitted that the defendant company is in financial difficulties. The conclusion is apparent: the defendant spent the plaintiff's money and has not been able to fulfill its part of the bargain. It has been delaying in accounting to the plaintiff for its behavior.

[28] The evidence for the defendant of purported amendments to the agreements of purchase and sale is scant. It relies on the self interested testimony of Mr. DePaolo and is wanting in any particularity. Mr. DePaolo cannot tell the plaintiff, even now, if or when he will be able and willing to close the transactions. There is no evidence of consideration given to the plaintiff for his alleged agreement to delay closing while his money was spent. He was not an investor of the defendant as Mr. DePaolo candidly acknowledged.

[29] Relying on the premise that the defendant has put its "best foot forward" I conclude that the evidence falls short of generating a genuine issue for trial based on the oral amendments to the agreement.

[30] While unnecessary to the result, I have considered the plaintiff's argument that amendments to the agreements must be in writing for the defendant to succeed

in advancing them as a defence to the action. That position does not conform to the law as I understand it.

[31] In *Wauchope v Maida* (1971) 22 D.L.R. (3d) 142, the Ontario Court of Appeal held that:

> 15 The **Statute of Frauds** of this Province prohibits actions on an oral contract for sale of lands, tenements or hereditaments or any interest in or concerning them. This language leaves such contracts valid for all other purposes, hence oral contracts may be used as a basis of defence. Thus, a parol agreement to annul or waive a particular stipulation in the written contract which has been mutually assented to and fully performed or tendered (as in the case at bar) may be offered as a valid defence to an action for a breach of the original contract.
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> 16 The appellants are defendants in an action brought to recover a sale deposit which was given as a guarantee for the performance of the contract, and although the alteration as to the first mortgage terms assented to by both parties did not comply with the statute, it can still operate as a defence. An agreement which is unenforceable under the **Statute of Frauds** is not invalid, and in a case of this kind will constitute to the same extent as if it complied with the statute a defence to a claim by the other contracting party to recover money paid or other property the title to which has passed in pursuance of it: *Frith v. Alliance Investment Co.* (1914), 20 D.L.R. 356, 49 S.C.R. 384, 6 W.W.R. 981; *Harrison v. Wrights Ltd.* (1919), 15 O.W.N. 442; *Kinzie v. Harper* (1908), 15 O.L.R. 582 at p. 584; *McGinnes v. Kennedy* (1869), 29 U.C.Q.B. 93 per Richards, C.J., at p. 97; *Thomas v. Brown* (1876), 1 Q.B.D. 714.

[32] This position was cited with approval in Nova Scotia in the case of *MacIntyre v. Spierenburg et al.* (1979) 41 N.S.R. (2d) 584 (N.S.S.C.T.D.). where Cowan C.J. held:

> 55 I also find that, if s. 6(d) of the **Statute of Frauds** applied to the oral agreements between the parties, nevertheless, the defendants are not precluded by the operation of that section from relying upon the oral agreements as a defence to the plaintiff's claim for recovery of the $ 500.00 deposit. This was decided in *Wauchope v. Maida et al.* (1971), 22 D.L.R.(3d) 142 (Ont. C.A.), per Schroeder, J.A. In that event, the defendants would not be in the position of bringing an action upon a contract, of which there was no note or memorandum in writing.

[33] In this case, it was open to the defendant to show evidence of an oral agreement in defence of the claim against it. That evidence is not present, indeed the evidence points to a contrary conclusion, that the plaintiff pressed for an earlier closing or return of his monies. It is only the vague claims advanced by Mr. DePaolo that suggest otherwise.

Conclusion

[34] The plaintiff's cause of action is entitled to succeed. There is no evidence upon which I can be satisfied that the defendant has raised a genuine issue for trial.

[35] Pursuant to **Civil Procedure Rule** 13.06(1) I order that the plaintiff is entitled to summary judgment and that defendant pay to the plaintiff the sum of $70,000. Pursuant to **Civil Procedure Rule** 70.07 the plaintiff shall have

prejudgment interest at the rate of 5% from the date of payment to the date of the order.

[36] The defendant will pay to the plaintiff costs in accordance with **C.P.R. 77** and **Tariff C**, in the amount of $750, which sum is payable forthwith. I direct counsel for the plaintiff to prepare the order.

[37] Dated at Halifax, Nova Scotia, this 2nd day of June 2010.

Duncan, J.